TERRORISM PREVENTION/Deference to Adequate State Habeas Remedies

SUBJECT: **Comprehensive Terrorism Prevention Act of 1995 . . . S. 735. Kyl amendment No. 1211 to the Hatch substitute amendment No. 1199.**

ACTION: AMENDMENT REJECTED, 38-61

SYNOPSIS: As reported, S. 735 will enact law enforcement provisions to prevent terrorism and to apprehend and punish terrorists, and will reform Federal and State capital and noncapital habeas corpus procedures.

The Hatch substitute amendment to S. 735 would make major revisions to the bill, particularly to the provisions regarding international terrorism, alien removal, and fundraising by terrorist organizations.

The Kyl amendment would prohibit Federal courts from accepting any application for a writ of habeas corpus on behalf of a person convicted by a State unless the remedies in the courts of that State were inadequate or ineffective to test the legality of the person's detention. ("Habeas corpus" in the context of this debate refers to the collateral (not on the merits) review of criminal convictions. State and Federal prisoners may file habeas corpus petitions alleging that constitutional, legal, or treaty requirements were violated in the process of convicting them. State prisoners may file petitions in State or Federal courts; Federal prisoners may file petitions only in Federal courts; District of Columbia prisoners may file petitions only in non-Federal, District courts. The right of a State prisoner to file a habeas petition in Federal court is a right that was granted by statute.)

Those favoring the amendment contended:

The Kyl amendment would take away from prisoners the right to run every habeas appeal they can think of through both the State and Federal courts. Under current law, any prisoner sitting idly in his cell may file as many writs of habeas corpus in his State system as he can dream up. Each of those writs can be appealed through the State courts up to the State supreme court, and from there they may each be appealed to the United States Supreme Court. The Kyl amendment would not change any part of the process up to this point. However, after running an appeal through this process, the same prisoner could take exactly the same appeal and run it through

(See other side)

YEAS (38)

Republicans (38 or 70%)	Democrats (0 or 0%)
Ashcroft	Kassebaum
Brown	Kempthorne
Burns	Kyl
Campbell	Lott
Coats	Lugar
Cochran	Mack
Coverdell	McCain
Craig	McConnell
D'Amato	Murkowski
Dole	Nickles
Domenici	Pressler
Faircloth	Santorum
Gramm	Shelby
Grams	Simpson
Grassley	Smith
Gregg	Stevens
Helms	Thomas
Hutchison	Thurmond
Inhofe	Warner

NAYS (61)

Republicans (16 or 30%)	Democrats (45 or 100%)	
Abraham	Akaka	Inouye
Bennett	Baucus	Johnston
Bond	Biden	Kennedy
Chafee	Bingaman	Kerrey
Cohen	Boxer	Kerry
DeWine	Bradley	Kohl
Frist	Breaux	Lautenberg
Gorton	Bryan	Leahy
Hatch	Bumpers	Levin
Hatfield	Byrd	Lieberman
Jeffords	Daschle	Mikulski
Packwood	Dodd	Moseley-Braun
Roth	Dorgan	Moynihan
Snowe	Exon	Murray
Specter	Feingold	Nunn
Thompson	Feinstein	Pell
	Ford	Pryor
	Glenn	Reid
	Graham	Robb
	Harkin	Rockefeller
	Heflin	Sarbanes
	Hollings	Simon
		Wellstone

NOT VOTING (1)

Republicans (0)	Democrats (1)
	Conrad-[2]

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

the Federal courts, all the up to the Supreme Court. The Kyl amendment would forbid this second run through the Federal system unless it were found that the remedies in the courts of the State were inadequate or ineffective to test the legality of the person's conviction.

This amendment is constitutional, and it makes simple commonsense. On the issue of constitutionality, we note for our colleagues that the amendment is already partially in effect, and has been upheld by a string of court decisions. Twenty-five years ago Congress passed a law providing that Federal habeas corpus review of District of Columbia convictions would not be available. The District of Columbia has a court system that is in effect a State court system. Convicts in the District may make habeas corpus appeals of their convictions within District Courts, and they may take those appeals all the way to the Supreme Court, but they may not then start all over again by taking exactly the same appeals to the Federal courts. In 1977, the United States Supreme Court unanimously upheld the constitutionality of this arrangement in *Swain* v. *Pressley*. Other cases that have upheld it include *Garris* v. *Lindsay*, a 1986 D.C. Circuit court case, and *Saleh* v. *Braxton*, a 1992 D.C. district court case.

The writ of habeas corpus we are talking about is not the writ that is in the Constitution. That writ applies to illegal imprisonment before a conviction. Further, as it was exercised in the early history of this country, it was understood to apply to Federal prisoners only. People detained without trial in States did not even have the recognized option of pursuing their preconviction claims of illegal imprisonment in Federal court.

The writ we are talking about is the right to challenge a State conviction on the grounds that it was obtained in violation of a Federal law or the Constitution. This right was granted statutorily in the early part of this century, due to the perceived incompetence and the religious and racial biases of some State court systems. The intention in granting this right was to guarantee fair trials. Federal courts were to review State decisions, and force States to hold new trials or release their prisoners in those cases that the Federal courts thought the trials had been unfair.

Over the years, the use, and abuse, of the right to file a habeas corpus appeal of a State conviction has expanded. State court systems are now swamped with frivolous appeals alleging violations of State and Federal constitutional requirements and laws, and a huge portion of those appeals also are filed in Federal courts. Many of those suits can be dismissed by Federal judges on the grounds that a full and fair State hearing has already been held, but not until after the Federal court has spent time and money reviewing the claims. For example, the Federal western district in the State of Oklahoma spends about 25 percent of its time on habeas corpus petitions. Some Senators have been dismissive of the burden on the Federal courts. To support their position, they have cited one case in which numerous habeas petitions have been filed to delay an execution for years, with only one-fourth of the delay being caused by Federal petitions. Instead of citing one anomalous case, we refer them to the Powell committee report, which found that "Federal habeas corpus made up 40 percent of the total delay from sentence to execution, in a sample of 50 cases." Of course, any unnecessary review is a waste of effort. In capital cases, it is a denial of justice.

Senators should keep in mind that the reason for originally allowing habeas petitions in Federal courts of State convictions was because certain State courts were inadequate or ineffective in determining the legality of convicting a person. This proposition, while arguably correct in the past, is not true today. If State court systems are competent to provide full and fair trials under State and Federal requirements, and they are, then they do not need to be second-guessed. Federal convicts can only file appeals through Federal courts, but State convicts may file exactly the same appeals through both courts. The implication, of course, is that only the Federal Government is competent to make rulings on the Constitution and Federal laws. We reject this implication. State courts can and must operate in full conformance with the Constitution and Federal laws. State judges are fully aware of constitutional requirements and Supreme Court precedents and are capable of applying them. In applying the Constitution, States will not each come up with their own interpretations, as some of our colleagues have alleged--they will be bound by Supreme Court precedents and Federal laws just as Federal judges are bound. In fact, if our colleagues are truly concerned about the proper application of the Constitution, they should look at the performance of certain Federal judges who have allowed their ideological opposition to the death penalty lead them to make decisions clearly at odds with the Supreme Court on capital punishment.

Anomalous, poor decisions occur in State courts just as they occur in Federal courts. Under the Kyl amendment, when they occur, they may be appealed right up to the Supreme Court. Also, under the Kyl amendment, any prisoner who believes that the State court system provided him an inadequate or ineffective opportunity to defend himself may file a Federal habeas petition on that basis. However, there is no commonsense reason for allowing a prisoner to get to try his case twice in two separate, competent court systems.

The Kyl amendment would instantly stop nearly all Federal collateral review of State cases. Nothing is gained by having Federal collateral review of those cases, but much is lost. The cost to the Federal system of disposing of frivolous cases is enormous, and justice is denied in capital cases when prisoners are able to delay their deaths with endless Federal appeals. We know that the amendment is constitutional and will work in practice because it has been in force without ill-effect for the past 25 years in the District of Columbia. We are therefore pleased to vote for its adoption.

Those opposing the amendment contended:

Generally there are three schools of thought on habeas corpus. First, some Senators are pleased with the current system. Most

Senators who oppose the death penalty fall into this category. They are pleased that the current system works to prevent people from being executed. Second, there are those Senators who generally agree with having Federal collateral review, but who wish to eliminate the ability to file frivolous pleadings. We fall into this second category, though we have marked differences of opinion on the type of reforms that are necessary. Finally, a third group of Senators does not believe that Federal collateral review of State cases on issues of Federal law needs to be provided at all. These Senators believe that States are competent to provide that review. Senator Kyl, who has offered this amendment, subscribes to this third view.

In our opinion, the main problem in having Federal review is that the right of review is often abused, particularly in capital cases. We want to stop the abuses without eliminating the right. (When we talk about the abuses, we do not want to overstate the case--most problems are with the State court systems. For example, in the *Guerra* case, 76 percent of the delay, or 9 years and 2 months, that took place was due to proceedings in Texas State courts, not Federal courts.) The right for Federal collateral review, though admittedly not as great now as it was just a few decades ago, nevertheless still exists. Though many States have very fine court systems, others still lag behind. Thankfully, the blatant and extreme competency and bias problems that existed at the turn of the century have been largely eliminated, but, on average, State court systems do not have the level of expertise that is found in the Federal court system. The need to provide full constitutional safeguards is especially important in capital cases. Failing to provide those safeguards can lead to the execution of innocent people. If we are going to allow the death penalty in America, and we believe we should, we should make sure it is applied appropriately. To apply it appropriately, the courthouse doors to the best criminal system, the Federal system, must be kept open. The Kyl amendment would block these doors. Accordingly, we urge its rejection.